

## REMARKS

There are three independent claims in the application which represent the distinction between the prior art and applicants invention. These are claims 1, 15 and 19. The Examiner recognized the distinction between the prior art and the claimed subject matter, but contended the distinction was obvious. Applicant traverses the Examiner's contention in the following remarks. Nonetheless, the claims have been amended to more clearly point out and distinctly claim the subject matter of the invention.

Briefly, the claims require first and second spaced rib members projecting outwardly from a container wall. These rib members simultaneously cooperate respectively with first and second inwardly extending flanges of a lid and effect attachment, in combination, between the lid and the container. The lowermost inwardly extending lid flange is, in part, removable along with an entire skirt extension depending therefrom. That is, a tear strip having a zigzag pattern may be removed from the skirt of the lid to thereby remove portions of the inwardly extending, lower or second flange and the entirety of a skirt extension and thus render the package, comprised of the container and lid, capable of being more easily opened, but also enabling replacement of the lid on the container more tightly than with the prior art constructions.

The prior art referenced by the Examiner is *Jiradejnunt et al.*, U.S. Patent 5,730,309. This patent discloses first and second outwardly extending container ribs with inwardly extending lid flanges cooperative therewith. The lid flanges are associated with a depending skirt. The lower flange is entirely removable to facilitate removal of the lid.

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The '309 patent reference, of course, does not show a zigzag tear associated with a lower or second lid flange. The Examiner relied upon the teachings of *Luberic* in Patent No. 5,617,968 which discloses a zigzag tear strip associated with a single lid flange. It is to be noted that the *Luberic* reference is directed to a single lid flange only. This is explained in the specification of *Luberic* by the statement that a tear strip is associated with the "primary detent means" and is removed to facilitate the "facile removal of the cover from operative relationship with the container." See column 2, lines 4-13. Throughout the specification of the *Luberic* patent it is emphasized that the tear strip is designed to disengage the single lid retaining flange from the primary detent means or the single container rib. There is no suggestion or inference that the tear strip should be disengaged from anything other than a primary rib or detent means.

Applicant respectfully suggests that the Examiner is relying upon hindsight to construct the combination specifically claimed by applicant. That is, applicant claims the primary or upper rib and its associated flange remain fully in tact and engageable as designed in the original container whereas the secondary retaining means, comprised of the lower rib and the associated inwardly extending flange, are altered in a manner leading to partial engagement. That alteration is the removal of portions of only the lower or second flange as well as the total skirt extension depending therefrom. The claims are so limited.

There is no suggestion in either of the references that the lower or second flange should be so modified. Nonetheless, the Examiner has made an inference which is not

suggested by either reference. Applicant respectfully suggests that the Examiner's inference is based on hindsight.

The U.S. Court of Appeals for the Federal Circuit in *In re Dembiczak* at 50 U.S.P.Q.2d 1614 (Fed.Cir. 1999), mandates an analysis to review the prior art as of the time the invention was made. In this regard, it is noted that the present invention was made subsequent, of course, to the time of the references cited by the Examiner. Yet, it is telling that neither of the references mentions, infers or suggests the combination now claimed, *i.e.*, partial removal of the lower flange and entire removal of the skirt extension.

The Federal Circuit goes on to say that . . . "case law makes clear that the best defense against the subtle but powerful attraction of the hindsight based obviousness analysis is rigorous application of the requirement for a showing of the teaching or motivation to combine prior art references." (*Id.* at 1617). Specific identification of the motivation, or at least the inference of such a motivation, is required.

In the present case there is no such inference in the references. In fact, the teaching and likely inference that is set forth in the references is directed solely to the upper or primary retention rib and removal of a flange associated therewith. This implies or infers total removal of the lower lid flange as specifically taught by the *Jirdejnunt et al.* reference. But this is not the combination set forth in applicant's present claims. Only the lower or second lid flange is partially removed and the upper or primary flange and its interaction with its associated rib remains fully in tact. In other words, the *Luberic* reference teaches removal of parts of the lid flange associated with the primary retention

rib. The *Jirdejnunt* '309 patent teaches fully maintaining the upper or primary lid flange and fully or completely removing the lower lid flange. Consequently, the combination that would result from the references cited by the Examiner is not the combination applicant has claimed. Rather, combining the prior art references would result in partial removal of the upper lid flange and total removal of the lower lid flange. That would be the logical combination of the two references.

Thus, the result and combination authored by the Examiner is believed to be a reliance upon hindsight and upon the teachings specifically set forth in applicants application and not a logical combination of the teachings of the references cited. Neither of the prior art references infer any other conclusion, and the Examiner does not demonstrate a contrary result or inference. Applicant submits where there is no inference made by the prior art even though there are other multiple possible combinations of the prior art, it is not proper to urge that the claimed unique combination is obvious without a specific teaching or inference in the art. In this case, any inference is contrary to that which is claimed and clearly there is no teaching of the combination. It is contrary because the prior art references suggest total removal of the lower flange (*Jirdejnunt et al.*) and partial removal of the top or primary flange (*Luberic*). This is not applicant's claim.

It is respectfully requested therefore that the claims in their amended condition be reconsidered and passed to allowance.

Respectfully submitted,

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